

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**ESTATE OF MICHAEL MARKOWITZ** :  
for Revision of a Determination or for Refund :  
of Motor Fuel Tax under Article 12-A of the :  
Tax Law for the Years 1982 and 1983. :

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In the Matter of the Petition :  
of :  
**GAS STOP, INC.** :  
for Revision of a Determination or for Refund :  
of Motor Fuel Tax under Article 12-A of the :  
Tax Law for the Period July 1982 through :  
February 1984. :

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DECISION  
DTA Nos. 801735,  
801744 & 807078

In the Matter of the Petition :  
of :  
**ESTATE OF MICHAEL MARKOWITZ,  
OFFICER OF SHOPPERS MARKETING, INC.** :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period September 1, 1982 :  
through November 30, 1983. :

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Petitioners Estate of Michael Markowitz, Gas Stop, Inc., and Estate of Michael Markowitz, officer of Shoppers Marketing, Inc., c/o Marvin E. Kramer & Associates, P.C., 1325 Franklin Avenue, Suite 165, Garden City, New York 11530, filed an exception to the determination of the Administrative Law Judge issued on March 30, 1995. Petitioners appeared by Marvin E. Kramer & Associates, P.C. (Marvin E. Kramer, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Petitioners' request for oral argument was denied.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Jenkins concurs. Commissioner Pinto took no part in the consideration of this decision.

### ***ISSUE***

Whether the determination of the Administrative Law Judge must be set aside and a new hearing held because petitioners were deprived of their rights of discovery pursuant to the Freedom of Information Law.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "1" which has been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

On May 18 and 19, 1994, a consolidated hearing was held in the three actions set forth in the captions above, as well as in five separate proceedings which resulted from the Division of Taxation's ("Division") issuance of eight assessments, to wit:

(a) Gas Stop, Inc. filed a petition to review Notice No. 2449, dated December 10, 1984, issued to Shoppers Marketing, Inc., and/or Gas Stop, Inc., and/or Lesez Petroleum Corp., and/or Michael Markowitz, and/or Joseph Skolnik, and/or David Bogatin, and/or Mieczyslaw Szczepkowski by the Division. The notice assessed motor fuel tax in the amount of \$4,662,250.02, plus penalty, for the period July 1982 through October 1983. Gas Stop, Inc. also petitioned Notice No. 2455, dated December 10, 1984, issued to Gas Stop, Inc. by the Division which assessed motor fuel tax in the amount of \$920,215.60, plus penalty, for the period April 1983 through February 1984.

(b) Joseph Skolnik filed a petition to review Notice No. 2449, issued to Joseph Skolnik, and/or others as more fully described in (a) above.

(c) Michael Markowitz filed a petition to review Notice No. 2449, issued to Michael Markowitz, and/or others as more fully described in (a) above.

(d) Michael Markowitz, as officer of Shoppers Marketing, Inc., filed a petition to review two notices of determination, Notice Nos. S880104875M and S880104876M, dated January 4, 1988, issued to Shoppers Marketing, Inc. and Michael Markowitz, as officer, respectively. The notices assessed sales and use taxes in the amount of \$4,883,696.20, plus penalties, including the fraud penalty, and interest for the period September 1, 1982 through November 30, 1983.

(e) Shoppers Marketing, Inc. filed a petition to review a Notice of Determination, Notice No. S800104875M, dated January 4, 1988, which set forth additional sales and use taxes due of \$4,883,696.20, plus fraud penalty and additional interest, for the period September 1, 1982 through November 30, 1983.

(f) Joseph Skolnik, as officer of Shoppers Marketing, Inc., filed a petition to review a Notice of Determination, Notice No. S880127878M, dated January 27, 1988. The notice assessed sales and use taxes in the amount of \$4,883,696.20, plus penalties, including the fraud penalty, and interest, for the period September 1, 1982 through November 30, 1983.

(g) Joseph Skolnik filed a petition to review a Notice of Determination, Notice No. S880420882M, dated April 20, 1988, issued to Joseph Skolnik, vice-president of Gas Stop, Inc. The notice assessed sales and use taxes in the amount of \$1,064,511.20, plus penalty, including the fraud penalty, and interest, for the period March 1, 1983 through February 29, 1984.

(h) Gas Stop, Inc. filed a petition to review a Notice of Determination, Notice No. S880420881M, dated April 20, 1988. The notice assessed sales and use taxes in the amount of \$1,064,511.20, plus penalties, including the fraud penalty, and interest, for the period March 1, 1983 through February 29, 1984.

Only petitioners Michael Markowitz, Michael Markowitz, Officer of Shoppers Marketing, Inc. and Gas Stop, Inc. (motor fuel tax assessment) took an exception to the determination of the Administrative Law Judge.<sup>1</sup>

By way of background, Shoppers Marketing, Inc. ("SMI") was a New York corporation incorporated under the laws of the State of New York on April 1, 1982 to buy and sell batteries, tires, oil and automobile accessories and to acquire such property, real and personal, necessary to conduct the business. Copies of any process served on the Secretary of State were to be served on Harold Wapnick, an accountant who provided services to Michael Markowitz and, to some

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<sup>1</sup>We have modified finding of fact "1" of the Administrative Law Judge's determination in order to clarify the fact that only three parties took exception to the determination.

extent, Joseph Skolnik. Mr. Wapnick was also the individual who filed the certificate of incorporation of SMI.

Mr. Wapnick was the same individual who filed certificates of incorporation with the New York State Secretary of State on behalf of Avenue Y Gas, Inc., on December 17, 1982, which corporation was to engage in the business of a gasoline service station, and AVI Enterprises, Inc., on February 9, 1982, also to engage in business as a gasoline service station.

A Republic National Bank savings account authorization certificate, executed on July 7, 1982 (three months after incorporation), indicated that the president was Szpila Tadeusz and the secretary was Leon Bercovici.

By agreement dated December 1, 1982, Szpila Tadeusz sold SMI to Mieczyslaw Szczepkowski for \$130,000.00 by transferring 10 shares of stock in the corporation. The agreement recited that SMI was a registered motor fuel distributor, holding registration number M-2352, issued on July 8, 1982. The sale agreement also stated that SMI had an agreement with Wechter Petroleum Corp. ("Wechter") and/or General Oil and AVI Enterprises, Inc. ("AVI") to terminal SMI's product, and that AVI was a nominee for SMI.

The transfer took place on February 21, 1983.

On March 3, 1983, Wechter entered into a terminalling agreement with AVI, which was to act as the terminal. Wechter was to provide monthly "throughput" statements to AVI, indicating the quantities of petroleum product ("product") received and delivered and the quantities in storage. AVI was to be responsible for all Federal, State and local taxes. Mieczyslaw Szczepkowski signed the agreement for AVI as "president".

Mr. Szczepkowski was a Polish national who did not speak English. He signed documents and checks for SMI, but was not able to communicate with either Mr. Markowitz or Mr. Skolnik, petitioners herein.

Mr. Markowitz testified at the criminal trial of Joseph Skolnik that the agreement set forth above was masterminded by himself, Joseph Skolnik, David Bogatin and their attorneys, and that Messrs. Tadeusz and Szczepkowski were only fronts for the real shareholders, i.e., Mr. Bogatin as the purchaser of SMI and petitioners Markowitz and Skolnik as the sellers, who he referred to

as the joint "principals" and the recipients of \$40,000.00 in product from Bogatin to each from the sale proceeds.

Markowitz and Skolnik continued to purchase gasoline product using the SMI name even after the sale, particularly from Lesez Petroleum, another corporation controlled by David Bogatin.<sup>2</sup>

Markowitz stated that it was "customary" practice in the gasoline industry, to which he and petitioner Skolnik were relatively new and inexperienced in the early 1980's, to reduce their exposure to liability (they both had real estate holdings to protect); they decided not to associate their names with any Article 12-A corporation and to use instead a "front guy" who would shield them from any tax liability.

Petitioners Markowitz and Skolnik were each 50% owners of SMI and Gas Stop, Inc., the latter of which received its Article 12-A motor fuel distributor's license in December of 1982.

SMI was petitioners Markowitz's and Skolnik's first foray into wholesale gasoline distribution. They had previously been involved in the retail side of the business. They found that being a 12-A distributor enabled them to get better prices for product without a middleman.

After SMI was sold in February 1983, petitioners Markowitz and Skolnik continued to purchase product in the SMI name, continuing to receive all the advantages of trading as a motor fuel distributor on a wholesale level but without the 12-A license they transferred to Bogatin.

Gas Stop, Inc. ("GSI") was also a 12-A motor fuel distributor incorporated in 1967, but it did not begin to conduct business in motor fuel until 1982. Petitioners Markowitz and Skolnik were also the principals/owners of this company and its sole shareholders, with Markowitz serving as its president and Skolnik as its vice-president.

A sales tax and motor fuel tax audit was conducted by the Division of SMI, GSI and persons associated with those corporations.

In April 1983, the Division's auditor, Grace Isaacs, commenced an audit of SMI from the Mineola District Office. As stated above, SMI was registered as a New York State motor fuel

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<sup>2</sup>Mr. Bogatin pleaded guilty to two class E felonies for willfully filing a false return or statement with the Tax Department pursuant to Tax Law § 289-b(2) on March 11, 1987.

distributor in July 1982 and was issued registration number M-2352. SMI's application for registration as a distributor of gasoline listed its address as 3912 New Utrecht Avenue, Brooklyn, New York. Szpila Tadeusz was listed as SMI's president at the address of 2024 East 18th Street, Brooklyn, New York, which is the residence address of Harold Wapnick, long-time accountant for petitioner Markowitz.

When the auditor visited the New Utrecht Avenue address, SMI was not located there and no forwarding address was left with the United States Postal Service. The owners at New Utrecht Avenue said they sometimes collected mail and took telephone calls for SMI. The auditor unsuccessfully attempted to contact the president of SMI, Szpila Tadeusz. Finally, the auditor called the second address given on SMI's application for registration which was the address of SMI's accountant, Harold Wapnick. Wapnick told the auditor that he did not know if he was still employed by SMI. Ms. Isaacs continued to attempt to contact SMI's president, Szpila Tadeusz, but was finally told by Mr. David Bogatin to call Harold Wapnick. Numerous oral requests were made to Wapnick for SMI's books and records; however, only a small amount of truck delivery tickets and three or four incomplete pages of a purchase journal were provided. Despite 15 to 20 requests thereafter, no other records were produced by Mr. Wapnick.

In October 1983, the auditor was instructed to work with the New York State Bureau of Tax Investigation ("BTI"). On October 26, 1983, subpoenas were issued by the New York State Department of Taxation and Finance to Joseph Skolnik, Michael Markowitz and others for all bills and records pertaining to the business of Shoppers Marketing, Inc., from September 1, 1982 to the present (which was October 26, 1983). The subpoena was received and signed for by Joseph Skolnik on October 27, 1983. Since the subpoenas were never honored, the books and records of SMI were never obtained by the Division. The subpoena requested the following books and records from SMI for the period September 1, 1982 through October 26, 1983:

- All purchase and sales invoices
- Bank statements
- Cancelled checks
- Deposit slips
- Any and all corporate bank accounts
- Corporate copy of all tax returns filed in New York City,  
New York State and United States Government

Cash receipts book  
General ledger  
Sales journal  
Accounts receivable ledger  
Accounts payable ledger  
Purchase journal  
Corporate minutes  
Incorporation papers

Due to the corporation's failure to provide books and records, the audit of SMI's motor fuel tax liability was based on third-party information obtained from internal records of the Division and from information which was obtained from the investigation for the criminal trial of People v. Skolnik. The auditor based the audit results only on those transactions that were determined to be billed to SMI and/or AVI, its nominee. Also, as gasoline is a volatile liquid which results in variations between the quantity of gas received and what a supplier records in its books, the auditor always used the most conservative figures to determine the tax due.

The information received by the Division included data received from New Jersey Barge Reports, barging companies, motor fuel terminals, distributors and suppliers who had sold fuel to SMI. The number of gallons of motor fuel was determined from suppliers' invoices, from the records of receipt of product transported by each barge. Gallons used for the assessments included the figures used in the criminal trial, including the gallons purchased from Astroline Corporation, Delphi Petroleum, George E. Warren, Northville Caribbean, Warren Petroleum and Sun Oil.

A total of 49,598,663 gallons of motor fuel was identified, which included over 42 barge deliveries imported from the State of New Jersey but never reported to the State of New York and upon which no motor fuel tax was paid. In addition, suppliers' invoices showed tax-free sales to SMI, the importer of record. SMI was also assessed for 5,706,794 gallons of motor fuel which it reported on its motor fuel tax returns as tax-free sales to EFCO, because EFCO denied ever receiving this product.

Specific information was obtained from the Wechter Terminal, also known as the Inwood Terminal, on Long Island. Wechter Petroleum is a terminal corporation which warehouses product which is usually received by water, via barges. Wechter had an agreement with AVI to

receive barges containing product to be stored at its terminal. Telexes to Wechter from AVI and barge receipts demonstrated that Wechter was authorized to receive, and did in fact receive, barges of fuel that were ordered by SMI for deposit into the account of AVI. Daily and month-end stock reports also reported product storage transactions between Wechter and AVI. The Division determined that all product deposited into the AVI account was also withdrawn from that account. Also, Philip Wechter, the manager of supply and distribution, testified that any questions regarding the account of AVI were handled by Joseph Skolnik, Michael Markowitz and Jerry Skolnik.

Wechter was affiliated with a company called General Oil, a marketing company of petroleum products. General Oil presented numerous invoices issued to SMI for petroleum product. The Division traced the motor fuel purchases of SMI through the New Jersey barge reports to the supplier and noted that the barging companies always picked up the product at various New Jersey terminals. Astroline Corporation also provided documentation which demonstrated sales of product to SMI which came from New Jersey and Warren Petroleum supplied documents of barges loaded in New Jersey which were invoiced to Gas Stop.

Documentation from two barging companies, Eklof Marine and Poling Transportation, was examined. It revealed that barges were ordered by SMI and barge invoices were addressed to SMI. However, the product was delivered to the AVI terminal account.

While Szpila Tadeusz was listed as the president of SMI, the records relied upon by the division consistently referred to Joseph Skolnik and Michael Markowitz. Joseph Skolnik independently became a registered motor fuel distributor (registration number M-2373) on September 3, 1982. This registration was cancelled on June 17, 1983 for Skolnik's failure to respond to the Division's bond requests.

The sales tax audit of SMI was conducted in conjunction with the motor fuel tax audit. The Division noted that the taxable gallons reported on SMI's motor fuel tax returns were approximately equal to the amount of gallons reported on its sales tax returns. To determine the price of each gallon subject to sales tax, the Division used the dollars reported on each sales tax return and compared it to the number of gallons reported on the motor fuel tax return as taxable.



This amount was divided by the number of gallons to determine the price per gallon for assessing each additional gallon in each period.

A motor fuel and sales tax audit was also conducted on Gas Stop. Gas Stop registered as a distributor of motor fuel in December 1982 (certificate number 2410). The address listed for Gas Stop was 1611 Avenue Y in Brooklyn, the same address used by SMI. On June 27, 1984, Gas Stop's books and records were requested from the corporation's accountant, Harris Polansky, for the period September 1982 to date. The request specifically stated, in part as follows:

"Kindly have available for this appointment all books and records including but not limited to the following:

Power of Attorney  
Tax Returns  
General Ledger  
Cash Journals  
Purchase and Sales Journals  
Check Books, Bank Statements and cancelled checks  
Thru-put statements  
Letters of credit and like agreements  
Purchase and Sales Invoices  
Barging Invoices  
Inventory Records  
Accountant's and Bookkeeper's workpapers."

No records were ever provided. As no records were provided, the tax was determined based on third-party information. With respect to the motor fuel tax, the gallons of product were determined from suppliers' tax returns, the Division's internal documents known as forms MT-123.1, records of "throughput" accounts at the New York Fuel Terminal a/k/a Manhattan and Queens Terminal and various barging receipts. In addition, Warren Petroleum reported tax-free sales of \$634,000.00 to Gas Stop, per Warren's tax returns. Gas Stop protested that the sales were made to SMI; however, these purchases were not reported by either Gas Stop or SMI. Gas Stop did not report purchases of gallons sold to Gas Stop tax-free by New York Fuel Terminal, Warren Petroleum, Lesez Petroleum and EJS, or report purchases or sales of fuel that were debited and credited to Gas Stop's "throughput" account at New York Fuel Terminal. Also, it was determined that Gas Stop overstated tax-free sales from "Northbrook".

The amount of sales tax due for Gas Stop was determined from the same gallons that were assessed for motor fuel tax purposes. Like the audit done for SMI, the average sales price

determined for each gallon was computed by comparing the money amount of sales reported by GSI for sales tax purposes with the number of gallons upon which motor fuel tax was paid by GSI. Joseph Skolnik signed the motor fuel tax returns of Gas Stop as vice-president and has stipulated to being its vice-president.

Angela Nedelka testified at both the hearing and the criminal trial of People v. Skolnik. Ms. Nedelka worked for Joseph Skolnik and his various companies from 1975 to 1985 as a bookkeeper. From 1982 to 1983, Ms. Nedelka worked at 1611 Avenue Y in Brooklyn. Many different corporations conducted business out of that Avenue Y location, including GSI and EJS Distributors. The businesses conducted from the premises at 1611 Avenue Y were owned by Joseph Skolnik and Michael Markowitz. Skolnik and Markowitz were present on the premises on a regular basis.

Ms. Nedelka testified that a checkbook and a sales journal for SMI were kept at 1611 Avenue Y. At the direction of Skolnik and Markowitz, Ms. Nedelka wrote checks on behalf of SMI, did bookkeeping work for EJS and GSI and made fuel purchases.

Ms. Nedelka made fuel purchases at the request of petitioners Skolnik or Markowitz. When Ms. Nedelka first started working at 1611 Avenue Y, Markowitz and Skolnik told Ms. Nedelka to identify herself to purchasers of motor fuel as Anne from SMI. Ms. Nedelka called various suppliers to obtain product prices and relayed this information to Skolnik and Markowitz. At their direction, Ms. Nedelka was instructed to either purchase the product or not. Markowitz and Skolnik also directed Ms. Nedelka with regard to which terminal the product should be delivered to and how payment should be made.

Ms. Nedelka, at Skolnik's and Markowitz's direction and in the presence of Skolnik, also conducted the belated preparation of sales invoices for SMI. Ms. Nedelka was told that an audit was being conducted for SMI and the accountant needed invoices. As no invoices for SMI existed, Ms. Nedelka was instructed to create invoices. Using a copy machine and existing invoices of EJS and GSI, Ms. Nedelka covered the letterhead of the EJS and GSI invoices with the letterhead of SMI. The manufactured invoices were then numbered sequentially. Mr. Wapnick gave Ms. Nedelka a sum total figure for each month that the invoices had to equal.

Each invoice was created using individual deliveries recorded in SMI's sales journal. Accordingly, all sales were not recorded on SMI's returns because invoices were created only up to the provided total amount.

On July 31, 1985, Michael Markowitz, Joseph Skolnik and David Bogatin were indicted (Indictment No. 29-1119AG) by a grand jury in Albany County Court of the State of New York. The indictment consisted of 14 counts. Seven of the counts alleged a violation of Tax Law § 289-b(2) and seven of the counts alleged a violation of section 175.35 of the Penal Law of the State of New York. The counts dealing with Tax Law § 289-b(2) charged that the defendants, acting in concert, being distributors or owners of motor fuel, did file or cause to be filed returns or statements, as required under Article 12-A of the Tax Law, which were willfully false for the periods December 1, 1982 through July 31, 1983. The counts dealing with section 175.35 of the Penal Law charged that the defendants, acting in concert, with intent to defraud the State or any political subdivision thereof and knowing that a written instrument, namely the New York State Return of Tax on Motor Fuels (Form MT-104) of Shoppers Marketing, Inc., contained a false statement or false information, did offer or present it to a public office or public servant, namely the New York State Department of Taxation and Finance, with the knowledge or belief that it would be filed with, registered in or otherwise become part of the records of such public office or public servant.

A plea agreement between the New York Attorney General and David Bogatin was entered into before Judge Harris on March 11, 1987. Bogatin entered a plea of guilty on counts 1 and 13 of the indictment, both violations of Tax Law § 289-b(2), a class E felony, in full satisfaction of all counts of the indictment. Bogatin's allocution for his plea of guilty implicated both Markowitz and Skolnik with respect to the acts underlying these two counts.

Michael Markowitz also entered into a plea agreement with the State of New York. Markowitz pleaded guilty to counts 1, 3 and 13 of the indictment, all violations of Tax Law § 289-b(2). As part of that agreement, Markowitz agreed to pay restitution to New York State in the amount of \$3,000,000.00 in taxes. The agreement noted that the New York State Department of Taxation and Finance is not bound by the agreement and may civilly or

administratively assess additional taxes, penalties and interest. Markowitz also agreed to make any books and records relating to the fuel oil and gasoline business available to the New York authorities and agreed to fully cooperate with prosecutors concerning the ongoing investigation of criminal activity within the fuel oil and gasoline industry in New York State. As part of this cooperation, Markowitz agreed to testify before all New York State court hearings.

After a full trial in the Albany County Court (Harris, J., presiding) in People v. Skolnik (135 Misc 2d 964, 517 NYS2d 411), Skolnik was acquitted. During the criminal trial of Skolnik, Markowitz testified on behalf of the State. Markowitz stated that shortly after SMI was incorporated, he and Joseph Skolnik became business partners and 50/50 partners in SMI; that Szpila Tadeusz was listed as the owner of SMI to shield Markowitz and Skolnik from any liability should any dispute arise; that Markowitz and Skolnik shared SMI's profits 50/50; and that he and Skolnik also owned several other companies, including GSI, AVI and EJS. AVI was used for a "throughput" account on Long Island for the storage of gasoline.

Markowitz testified that SMI conducted business from the offices at 1611 Avenue Y and became an article 12-A distributor in 1982. Through SMI, Markowitz and Skolnik purchased and sold product. Markowitz and Skolnik made joint decisions concerning the purchase of product for SMI and conferred with each other on a daily basis. A Republic National Bank account for SMI was opened initially with the name of Szpila Tadeusz; later, Markowitz and Skolnik signed the account as president and secretary. At some point in time, the names of the owners of SMI were changed from Tadeusz and Bercovici to Markowitz and Skolnik until the business was "sold".

Markowitz eventually became a partner in Skolnik's business of GSI and thereafter GSI applied for a 12-A distributor number. For a period of time, Markowitz and Skolnik operated both SMI and GSI with M numbers until SMI was sold.

Markowitz and Skolnik eventually "sold" SMI to David Bogatin and received a "profit" on its sale in the amount of \$40,000.00 each. As mentioned above, the "profit" was received by Skolnik and Markowitz in free product from Bogatin's companies, one of which was Lesez Corporation. Bogatin also attempted to shield his liability for SMI's obligations by using a non-

English-speaking man named Mieczyslaw Szczepkowski to sign all papers and act as the president of SMI.

On February 25, 1983, a Motor Fuel Distributor Information Report was filed for SMI listing Mieczyslaw Szczepkowski as president. The business address changed from 1611 Avenue Y to 6500 Jericho Turnpike, Commack, New York sometime thereafter.

Both before and after the "sale" of SMI to Bogatin, SMI purchased gas from Bogatin's company, Lesez. The sales invoices issued by Lesez to SMI all stated that tax was included in the sales price; however, the gas was sold without tax included. It was obvious that the tax was not paid because Markowitz and Skolnik knew what the purchase price of the product was and the amount of tax that should be paid. If tax was included in the price, it would be impossible for Bogatin to have made a profit. Markowitz also testified that he knew that all the gallons purchased by SMI were not recorded on its tax returns. Around May or June of 1983, Markowitz and Skolnik were no longer involved in purchasing product for SMI because SMI was under investigation. Markowitz and Skolnik continued to purchase product for GSI from Lesez.

After SMI was "sold", Markowitz and Skolnik continued to help with SMI's operation on a daily basis and were compensated by purchases of gasoline for GSI without tax from Bogatin's companies, SMI and Lesez, and by the fact that they were buying for themselves at wholesale without having their own "M" number. Prior to the "sale" of SMI, both Markowitz and Skolnik gave information to the company's accountant regarding what to report on SMI's tax returns. After the "sale" of SMI, Markowitz and Skolnik helped Bogatin with SMI's tax returns to reflect the amount of gasoline sold by Markowitz and Skolnik through their different companies.

Harold Wapnick also testified at the criminal trial. Wapnick prepared the motor fuel tax returns for SMI for the periods May 1982 through July 1983. Wapnick received backup to prepare the returns for approximately three months. Thereafter, Markowitz and Skolnik only provided information which showed total gallons and broke down the gallons into various categories -- purchased and shipped.

Seth Wapnick, Harold Wapnick's son, testified at the criminal trial. Seth Wapnick also prepared sales tax returns for SMI. Originally, invoices showing product deliveries were provided

by SMI in order to prepare the returns. After approximately three months, Markowitz and Skolnik provided Seth Wapnick with the number on a piece of paper or over the telephone.

In addition to the facts found by the Administrative Law Judge, we find the following:

At the opening of the hearing in this matter held on May 18, 1994, the representative of petitioners Michael Markowitz, Michael Markowitz as officer of Shoppers Marketing, Inc and Gas Stop, Inc. (hereinafter "representative of petitioner Markowitz") made an oral motion to postpone the hearing until he had an opportunity to examine a box of documents which the Division had just presented to him. In addition, he requested that additional documents be photocopied and presented to him by the Division. Representatives of all parties present were heard on the motion.

The representative of petitioner Markowitz stated that he had attended a hearing in Albany County Supreme Court earlier in the day of May 18, 1994 concerning a request by petitioner Markowitz on October 19, 1993 for production of certain documents by the Division pursuant to the Freedom of Information Law (hereinafter "FOIL") (Public Officers Law, §§ 84 et seq.). He alleged that Supreme Court Judge Joseph Harris had ordered the Division to make all requested documents available to petitioner Markowitz.

The Division offered one box of documents to the representative of petitioner Markowitz prior to the hearing for him to inspect.

The Division's representative stated that all the documents that would be available pursuant to the FOIL request were provided at the hearing for inspection.

In response to the oral motion of the representative of petitioner Markowitz, the Administrative Law Judge ordered that the hearing would proceed as scheduled and that the representative of petitioner Markowitz would have time to review the documents before the testimony of the Division's witnesses was presented.

In spite of being advised by the Administrative Law Judge that the hearing would continue, with or without his presence, the representative of petitioner Markowitz left the hearing and did not participate in the hearing nor did he return to the hearing.

The representative of petitioner Markowitz neither availed himself of the opportunity to inspect the documents produced by the Division nor introduced any evidence on behalf of petitioner Markowitz.

### ***OPINION***

In their exception, petitioners complain that the determination of the Administrative Law Judge:

"must totally be set aside and be scheduled for a Trial de novo by reason of material misconduct by the Court in depriving the Petitioners, The Estate of Michael Markowitz, The Estate of Michael Markowitz, as an Officer of Shoppers Marketing, Inc. an [sic] The Estate of Michael Markowitz, as an Officer of Gas Stop, Inc., of their rights of Discovery pursuant to the Freedom of Information Law" (Petitioner's exception, p. 4).

They then proceed to detail the course of the alleged FOIL request made by the representative of petitioner Markowitz to the Division and that representative's contacts with the Division concerning the Division's compliance therewith.

Further, petitioners allege that:

"The refusal of Judge Pinto to adjourn the Hearing until all of the FOIL materials were supplied including the Audit Reports and the Petitioner having been given an opportunity to review those materials in depth to prepare for Trial constituted gross material error and as a result necessitates a reversal of the Decision herein. After the refusal of the adjournment the Representative of the petitioners left the Hearing and did not participate therein for the purpose of not clouding the record and issues to be reviewed. . . . This Appeal is based solely upon the Department's failure to comply with the Freedom of Information Law and deprivation of the Petitioners' Discovery rights" (Petitioner's exception, pp. 4-5).

Petitioners did not submit a brief in support of their exception. However, the Division, in opposition thereto, argues that all documents covered by petitioner Markowitz's FOIL request were made available for review at the hearing but the representative of petitioner Markowitz did not review them. Copies of these documents were furnished to the parties subsequent to the hearing but there is no indication that these materials were ever reviewed. The Division points out that petitioners' exception seems to seek review of post-hearing requests to the Administrative Law Judge for either a postponement of the hearing or a trial de novo. However, if they are considered as such, there has been no basis shown to entitle petitioners to such relief.

The Division also argues that neither the Tax Appeals Tribunal nor the Division of Tax Appeals is empowered by law to review matters arising as a result of a FOIL request. Further, contrary to the allegations of petitioners, discovery is not available as a matter of right in administrative proceedings. The Rules of Practice of the Tax Appeals Tribunal, in effect at the time of the hearing held before the Administrative Law Judge, permitted a motion for discovery

but only based upon good cause and no such motion was made here. Here, petitioners appeared by their representative who made an oral request for adjournment which was denied. The representative refused opportunities to review documents that were made available to him and left the hearing.

Petitioners, in reply to the Division's brief, continue to discuss communications between the representative of petitioner Markowitz and the Division concerning the FOIL request and to argue that because such materials were given to that representative just prior to the hearing, he made a conscious decision to leave the hearing rather than "participate in the 'star chamber' hearings that were on going nor to participate in a scam as to which the Petitioner had no opportunity for preparation or for proper representation of the Taxpayer" (Petitioners' reply brief, p. 6).

We deny the exception of petitioners and affirm the determination of the Administrative Law Judge.

In the first instance, assuming that petitioner Markowitz did make a FOIL request of the Division (and we can only assume this for there is neither documentary nor testimonial evidence in the record to establish that such a request was made or what material was requested), sections 87 and 89 of the Public Officers Law and 20 NYCRR Part 2370 contain specific procedures to be followed for requesting public records from the Division of Taxation and provide an administrative and judicial remedy when access to such records is denied. Petitioners have provided no evidence at all concerning petitioner Markowitz's FOIL request, the response of the Division or remedies petitioner Markowitz may have pursued. In any event, petitioners have not cited any authority (nor are we aware of any) that gives either the Division of Tax Appeals or the Tax Appeals Tribunal jurisdiction to provide a remedy to petitioner Markowitz if his FOIL request was not complied with.

Secondly, as the Division correctly points out, discovery is limited in proceedings before the Division of Tax Appeals. Former section 3000.5(a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provided, in applicable part, that "[f]or good cause shown, the tribunal or an administrative law judge designated by the tribunal may grant a form of discovery by order"



(20 NYCRR former 3000.5[a]).<sup>3</sup> The only information in the record concerning a request for discovery by petitioner Markowitz's representative is an oral motion for discovery which was granted by the Administrative Law Judge.

As to the decision by the Administrative Law Judge not to delay the conduct of the hearing by granting the representative of petitioner Markowitz's request for an adjournment, former section 3000.10(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in applicable part, that: "[a]t the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice." The Administrative Law Judge, therefore, has discretion to grant or deny an adjournment depending on the gravity of the situation. Here, the Administrative Law Judge did not allow the discovery request by the representative of petitioner Markowitz to delay the hearing. We find that this was an appropriate disposition of that discovery request. We note that the record discloses that the resolution of this motion at the commencement of the hearing also affected the representative of the remaining five petitioners who, unlike the representative of petitioner Markowitz, took advantage of the opportunity to review the documents produced by the Division and fully participated in the hearing.

Since petitioners have stated that their exception is concerned solely with the Division's alleged failure to comply with FOIL and the deprivation of petitioners' discovery rights, based on the foregoing we deny petitioners' exception and sustain the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Estate of Michael Markowitz, Gas Stop, Inc. and Estate of Michael Markowitz, Officer of Shoppers Marketing, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

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<sup>3</sup>This provision was eliminated from the Tribunal's Rules in November 1995.

3. The petitions of Michael Markowitz, Gas Stop, Inc. and Michael Markowitz, Officer of Shoppers Marketing, Inc. are denied; and

4. The notice of determination issued to Michael Markowitz dated December 10, 1984, the notices of determination issued to Gas Stop, Inc. dated December 10, 1984 and the notices of determination issued to Michael Markowitz, Officer of Shoppers Marketing, Inc., dated January 4, 1988 are sustained.

DATED: Troy, New York  
February 27, 1997

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner